

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
VICTORIA DIVISION

UNITED STATES OF AMERICA  
and STATE OF TEXAS

Plaintiffs,

v.

ALCOA INC. and ALCOA WORLD  
ALUMINA L.L.C.

Defendants.

CIVIL ACTION NO. \_\_\_\_\_

**CONSENT DECREE**  
**FOR CERCLA RESPONSE ACTIONS AND RESPONSE COSTS**

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**I. BACKGROUND**

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), the United States Department of Interior, acting through the United States Fish and Wildlife Service ("DOI/FWS") and the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce; and the State of Texas ("State") on behalf of the Texas Commission on Environmental Quality ("TCEQ"), the Texas General Land Office ("GLO"), and the Texas Parks

and Wildlife Department (“TPWD”), filed a Complaint in this matter pursuant to Sections 104, 106, 107, and 113(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §§ 9604, 9606, 9607, and 9613(b), and Section 311 of the Clean Water Act (“CWA”), 33 U.S.C. § 1321.

B. The United States in its Complaint seeks, *inter alia*: (1) reimbursement of costs incurred by EPA and the Department of Justice (“DOJ”) for response actions at the Alcoa/Lavaca Bay Superfund Site (“Site,” “Lavaca Bay Site”) in Calhoun County, Texas, together with accrued interest; (2) performance of studies and response work by Alcoa Inc. f/k/a Aluminum Company of America (“Alcoa Inc.”) and its affiliate Alcoa World Alumina L.L.C. (“Settling Defendants,” as more specifically defined in Section IV, *infra*) at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) (“NCP”); and (3) natural resource damages, including past and future costs incurred by NOAA and DOI/FWS (the “Federal Trustees”) as a result of these damages. The State has also asserted claims against the Settling Defendants in this Court alleging that the Settling Defendants are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and Texas law. This Consent Decree and the Consent Decree for Natural Resource Damages filed contemporaneously herewith resolve all claims in the Complaint.

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State in May of 2002 of negotiations with potentially responsible parties regarding the implementation of the remedial design and remedial action for the Site, and EPA has provided the State with an opportunity to participate in such negotiations and to be a party to this Consent Decree.

D. In accordance with Section 122(j)(1) of CERCLA, 42 U.S.C. § 9622(j)(1), EPA notified the DOI/FWS, NOAA, and the State in May of 2002 of negotiations with potentially responsible parties regarding the release of hazardous substances that may have resulted in injury to the natural resources under Federal and State trusteeship and encouraged the Federal and State Trustees to participate in the negotiation of this Consent Decree. The State and Federal Trustees have conducted separate negotiations with the Settling Defendants concerning injury to natural resources at this Site.

E. The Settling Defendants that have entered into this Consent Decree do not admit any liability to the Plaintiffs arising out of the transactions or occurrences alleged in the Complaint, nor do they acknowledge that the release or threatened release of hazardous substances at or from the Site constitutes an imminent or substantial endangerment to the public health or welfare or the environment.

F. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register on February 23, 1994, 59 Fed. Reg. 8724.

G. In response to a release or a substantial threat of a release of a hazardous substance at or from the Site, the Aluminum Company of America commenced under an Administrative Order on Consent ("AOC") concluded on March 31, 1994, a Remedial Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430. In the Matter of Alcoa (Point Comfort)/Lavaca Bay Superfund Site, U.S. EPA CERCLA Docket No. 6-11-94. The AOC was amended by agreement of the parties in a Modification concluded on September 27, 1995, to provide for prospective payment of EPA AOC response costs (as defined in the AOC) through a reimbursable special account ("RI/FS RUB Account") established within

the Hazardous Substance Trust Fund to receive funds dedicated to EPA RI/FS response costs for this Site. The Modification provides, *inter alia*, that “EPA shall remit and return to Respondent [Alcoa Inc.] the balance of funds, if any, in the ALCOA RUB Account on the date of termination of this Consent Order.” Modification, ¶106(d), p.3.

H. Prior to entry of the AOC, EPA, by letter dated May 21, 1992, transmitted to Alcoa Inc. a proposed Administrative Order on Consent, pursuant to Section 3008(h) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6928(h)(the “3008(h) Order”), to require corrective action in response to alleged releases of hazardous waste into the environment at the Alcoa/Point Comfort Operations Plant (“Plant”). The 3008(h) Order was not entered by EPA. Instead, corrective action and response measures deemed necessary to protect human health or the environment based on releases at the Plant have been addressed under CERCLA and, as a result, the claims in the 3008(h) Order have been resolved by the entry of the AOC and this Consent Decree.

I. On June 6, 1994, EPA concluded a Cooperative Management Agreement (“CMA”) for the Lavaca Bay Site with the State and with NOAA (on behalf of itself and DOI) to provide a mechanism for effective coordination of all of the interests and concerns of the State and Federal agencies involved with the Lavaca Bay Site. The CMA provided for participation by the State Trustees, including the GLO, the TPWD, and the Texas Natural Resource Conservation Commission (“TNRCC” – now known as TCEQ), as well as TNRCC in its capacity as the State Superfund agency in oversight of the RI/FS and removal action conducted by Alcoa Inc. under the 1994 AOC with EPA.

J. Alcoa Inc. transferred ownership but not operational control of the Plant to its affiliate Alcoa World Alumina L.L.C. in 1994.

K. On August 6, 1997, EPA published for comment an Engineering Evaluation/Cost Analysis ("EE/CA") for a non-time-critical ("NTC") removal action at the Dredge Island on the Site. The proposed removal action consisted of relocating the contents of the Dredge Management Placement Areas containing elevated levels of mercury into the Gypsum Placement Areas ("GPAs"). In addition, approximately 93,000 cubic yards of soils having concentrations greater than 0.7 mg/kg total mercury were returned to the GPAs. The south slope of the island was to be armored to protect against erosion and wash-out in the event of hurricane or other severe storm. Comments on the EE/CA were accepted from August 6 to September 22, 1997. EPA issued an Action Memorandum authorizing the removal action on April 30, 1998. Alcoa Inc. undertook the work under EPA oversight pursuant to the AOC. The removal action was completed in April of 2001.

L. Alcoa Inc. completed a Remedial Investigation ("RI") Report on March 6, 2000, and a Feasibility Study ("FS") Report in May 2001.

M. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on June 22, 25, and 26, 2001, in major local newspapers of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

N. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision ("ROD"), executed on December 20, 2001, on which the State has given its concurrence. The ROD includes EPA's explanation for any significant differences between the final plan and the proposed plan as well as a responsiveness summary to

the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

O. Based on the information presently available to EPA and the State, EPA and the State believe that the Work (as defined below) will be properly and promptly conducted by the Settling Defendants if conducted in accordance with the requirements of this Consent Decree and its appendices.

P. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action selected by the ROD and the Work to be performed by the Settling Defendants shall constitute a response action taken or ordered by the President.

Q. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## **II. JURISDICTION**

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying Complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.



### **III. PARTIES BOUND**

2. This Consent Decree applies to and is binding upon the United States and the State and upon Settling Defendants and their successors and assigns. Any change in ownership or corporate status of a Settling Defendant, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. Settling Defendants shall provide a copy of this Consent Decree to each contractor hired to perform the Work required by this Consent Decree and to each person representing any Settling Defendant with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. Settling Defendants or their contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

### **IV. DEFINITIONS**

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601, *et seq.*

“Consent Decree” shall mean this Decree and all appendices attached hereto (listed in Section XXIX). In the event of conflict between this Decree and any appendix, this Decree shall control.

“Day” shall mean a calendar day unless expressly stated to be a working day.

“Effective Date” shall be the effective date of this Consent Decree as provided in Paragraph 113.

“EPA” shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

“Future Response Costs” shall mean all costs not inconsistent with the NCP, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV, and Paragraph 94 of Section XXI. Future Response Costs shall also include all costs incurred in connection with Dispute Resolution pursuant to Section XIX (Dispute Resolution) and all litigation costs to the extent the United States prevails therein. Future Response Costs shall also include all Interim Response Costs.

“Interim Response Costs” shall mean all costs not inconsistent with the NCP, including direct and indirect costs, (a) paid by EPA in connection with the Site between September 30,

2003 and the Effective Date, or (b) incurred by EPA and DOJ prior to the Effective Date but paid by EPA after that date.

“Interest,” shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

“National Contingency Plan” or “NCP” shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, and any amendments thereto.

“Operation and Maintenance” or “O & M” shall mean all activities required to maintain the effectiveness of the Remedial Action as required under the Operation and Maintenance Plan approved or developed by EPA pursuant to this Consent Decree and the Statement of Work (“SOW”).

“Operations, Maintenance, and Monitoring Plans (“OMMPs”) shall mean plans for operation and maintenance, and monitoring of certain components of the Remedial Action. The OMMPs have already been completed and are made a part of this Consent Decree as attachments to the Statement of Work

“Paragraph” shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

“Parties” shall mean the United States, the State of Texas, and the Settling Defendants.

“Past Response Costs” shall mean all costs not inconsistent with the NCP, including, but not limited to, direct and indirect costs, that the United States paid at or in connection with the Site through September 30, 2003, the sum of which costs the Parties agree is \$404,726.

“Performance Standards” shall mean the cleanup standards and other measures of achievement of the goals of the Remedial Action, set forth in Sections 8 and 12 of the ROD.

“Plaintiffs” shall mean the United States and the State of Texas.

“Plant” shall mean the Alcoa/Point Comfort Operations Plant.

“RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 *et seq.* (also known as the Resource Conservation and Recovery Act).

“Record of Decision” or “ROD” shall mean the EPA Record of Decision relating to the Site signed on December 20, 2001, by the Director of the Superfund Division (delegate of the Regional Administrator), EPA Region 6, and all attachments thereto. The ROD is attached as Appendix A.

“Released Party” shall mean Alcoa World Alumina L.L.C., a limited liability company incorporated in the State of Delaware, which acquired ownership but not operational control of the Plant in 1994.

“Remedial Action” shall mean those activities, except for Operation and Maintenance, to be undertaken by the Settling Defendants to implement the ROD, in accordance with the SOW and the final Remedial Design and Remedial Action Work Plans and other plans approved by EPA.

“Remedial Action Work Plan” shall mean the document developed pursuant to Paragraph 12 of this Consent Decree and approved by EPA, and any amendments thereto.

“Remedial Design” shall mean the Remedial Design Reports for the Remedial Action which have been completed and made a part of this Consent Decree as attachments to the Statement of Work (Appendix B).

“Response Costs” shall mean all costs not inconsistent with the NCP that the United States or the State incur in connection with this Site, more particularly defined in this Section as “Future Response Costs,” “Interim Response Costs,” “Past Response Costs,” “State Future Response Costs,” “State Interim Response Costs,” and “State Past Response Costs.”

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Settling Defendants” shall mean 1) Alcoa Inc., a corporation incorporated in the Commonwealth of Pennsylvania and doing business at Point Comfort, Texas, which corporation was formerly known as Aluminum Company of America, and 2) Alcoa World Alumina L.L.C., a limited liability company incorporated in the State of Delaware, which has acquired ownership but not operational control of the Plant.

“Site” shall mean the Alcoa/Lavaca Bay Superfund Site, generally consisting of the Plant, Dredge Island, Formosa Tract, and portions of Lavaca Bay, Cox Bay, Cox Creek, Cox Cove, Cox Lake (Cox Creek, Cox Cove, and Cox Lake are also known as Huisache Creek, Cove and Lake) and western Matagorda Bay located in Calhoun County, Texas, and areas containing hazardous substances depicted generally on the map attached as Appendix C.

“State” shall mean the State of Texas.

“State Future Response Costs” shall mean all costs not inconsistent with the NCP, including, but not limited to, direct and indirect costs, that the State incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not limited

to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, IX (including, but not limited to, the cost of attorney time and any monies paid to secure access and/or to secure or implement institutional controls including, but not limited to, the amount of just compensation), XV, and Paragraph 94 of Section XXI. State Future Response Costs shall also include all costs incurred in connection with Section XIX (Dispute Resolution) and all litigation costs to the extent the State prevails therein. State Future Response Costs shall also include all State Interim Response Costs.

“State Interim Response Costs” shall mean all costs not inconsistent with the NCP, including direct and indirect costs, (a) paid by the State in connection with the Site by the TCEQ between January 1, 2002, and by the Office of the Attorney General between June 30, 2004, and the Effective Date, or (b) incurred prior to the Effective Date but paid by the State after that date.

“State Past Response Costs” shall mean all costs not inconsistent with the NCP, including, but not limited to, direct and indirect costs, that the State paid at or in connection with the Site through December 31, 2001 for the TCEQ and through June 30, 2004 for the Office of the Attorney General, the sum of which costs the Parties agree is \$199,086.33 (\$99,086.33 TCEQ costs + \$100,000 Attorney General’s Office costs).

“Statement of Work” or “SOW” shall mean the statement of work for implementation of the Remedial Action and Operation and Maintenance at the Site, as set forth in Appendix B to this Consent Decree, and any modifications made in accordance with this Consent Decree.

“Supervising Contractor” shall mean the principal contractor retained by the Settling Defendants to supervise and direct the implementation of the Work under this Consent Decree.

“TCEQ” shall mean the Texas Commission on Environmental Quality and any successor departments or agencies of the State.

“United States” shall mean the United States of America.

“Waste Material” shall mean (1) any “hazardous substance” under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14) or (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33).

“Work” shall mean all activities Settling Defendants are required to perform under this Consent Decree, except those required by Section XXV (Retention of Records).

“Working Day(s)” shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

#### **V. GENERAL PROVISIONS**

5. Objectives of the Parties. The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the implementation of response actions at the Site by the Settling Defendants, to reimburse response costs of the Plaintiffs, and to resolve the claims of Plaintiffs against Settling Defendants as provided in this Consent Decree.

6. Commitments by Settling Defendants.

a. Settling Defendants shall finance and perform the Work in accordance with this Consent Decree, the ROD, the SOW, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by Settling Defendants and approved by EPA pursuant to this Consent Decree. Settling Defendants shall also reimburse the United States and the State for Response Costs as provided in this Consent Decree.

b. The obligations of Settling Defendants to implement the requirements of this Consent Decree are joint and several. In the event of the insolvency or other failure of any one Settling Defendant to implement the requirements of this Consent Decree, the remaining Settling Defendant shall complete all such requirements.

c. Settling Defendant Alcoa Inc. shall have primary responsibility to fulfill all requirements of this Consent Decree including, but not limited to, financing and performing the Work in accordance with this Consent Decree and reimbursing the Response Costs of the United States and the State as provided in this Consent Decree. In the event that Alcoa Inc. fails to perform one or more of its obligations under this Consent Decree, the United States, after consultation with the State, shall give notice to the Released Party of its intention to seek performance under the Consent Decree by the Released Party. The notice shall state the specific requirements under the Consent Decree that Alcoa Inc. has failed to perform and the schedule under which such performance must be completed. If within thirty (30) days of such notice, Alcoa Inc. has not (a) performed the specific requirements or (b) reached agreement with the United States on a schedule for performance, or (c) invoked Dispute Resolution pursuant to Section XIX (Dispute Resolution), the Released Party shall perform such obligation(s) if the United States, or the State, so directs in writing. If Alcoa Inc. has invoked Dispute Resolution pursuant to Section XIX (Dispute Resolution) with regard to the obligation(s) at issue, then the thirty (30) day period shall not begin to run until the dispute resolution process has been completed. In the event that the United States invokes its right to direct that the Released Party perform Alcoa Inc.'s obligations under this Consent Decree, the Released Party shall assume all rights and responsibilities of Alcoa Inc. under this Consent Decree. Invocation by the United States of its right to request that the Released Party perform Alcoa Inc.'s obligations under this



Consent Decree, shall not excuse performance by Alcoa Inc. and shall not waive the right of EPA and/or the United States to enforce the requirements of this Consent Decree against Alcoa Inc. and the State's right to require Alcoa Inc. to perform its obligations to the State.

d. The Released Party shall have the same rights and protections afforded to Alcoa Inc. under this Consent Decree.

7. Compliance With Applicable Law. All activities undertaken by Settling Defendants pursuant to this Consent Decree shall be performed in accordance with the requirements of all applicable federal and state laws and regulations. Settling Defendants must also comply with all applicable or relevant and appropriate requirements of all Federal and State environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits.

a. As provided in Section 121(e) of CERCLA and Section 300.400(e) of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site (i.e., within the areal extent of contamination or in very close proximity to the contamination and necessary for implementation of the Work). Where any portion of the Work that is not on-site requires a federal or state permit or approval, Settling Defendants shall submit timely and complete applications and take all other actions necessary to obtain all such permits or approvals.

b. The Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

9. Notice to Successors-in-Title.

a. With respect to any property owned or controlled by the Settling Defendants that is located within the Site, within 15 days after the entry of this Consent Decree, the Settling Defendants shall submit to EPA for review and approval a notice to be filed with the Recorder's Office, Calhoun County, State of Texas, which shall provide notice to all successors-in-title that the property is part of the Site, that EPA selected a remedy for the Site on December 20, 2001, and that Settling Defendants have entered into a Consent Decree requiring implementation of the remedy. Such notice shall identify the United States District Court in which the Consent Decree was filed, the name and civil action number of this case, and the date the Consent Decree was entered by the Court. The Settling Defendants shall record the notice within 10 days of EPA's approval of the notice. The Settling Defendants shall provide EPA with a certified copy of the recorded notice within 20 days of recording such notice. The Settling Defendants may file a notice of completion after all Work has been completed in accordance with Paragraph 53.

b. Unless all Work has been completed in accordance with Paragraph 53, at least 30 days prior to the conveyance of any interest in property located within the Site including, but not limited to, fee interests, leasehold interests, and mortgage interests, the Settling Defendant conveying the interest shall give the grantee written notice of (i) this Consent Decree, (ii) any instrument by which an interest in real property has been conveyed that confers a right of access to the Site (hereinafter referred to as "access easements") pursuant to Section IX (Access and Institutional Controls), and (iii) any instrument by which an interest in real property has been conveyed that confers a right to enforce restrictions on the use of such property (hereinafter referred to as "restrictive easements") pursuant to Section IX (Access and Institutional Controls). At least 30 days prior to such conveyance, the Settling Defendant conveying the interest shall

also give written notice to EPA and the State of the proposed conveyance, including the name and address of the grantee, and the date on which notice of the Consent Decree, access easements, and/or restrictive easements was given to the grantee.

c. In the event of any such conveyance, the Settling Defendants' obligations under this Consent Decree, including, but not limited to, the obligation to provide or secure access and institutional controls, as well as to abide by such institutional controls, pursuant to Section IX (Access and Institutional Controls) of this Consent Decree, shall continue to be met by the Settling Defendants. In no event shall the conveyance release or otherwise affect the liability of the Settling Defendants to comply with all provisions of this Consent Decree, absent the prior written consent of EPA. If the United States approves, the grantee may perform some or all of the Work under this Consent Decree.

## **VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS**

### **10. Selection of Supervising Contractor.**

a. All aspects of the Work to be performed by Settling Defendants pursuant to Sections VI (Performance of the Work by Settling Defendants), VII (Remedy Review), VIII (Quality Assurance, Sampling and Data Analysis), and XV (Emergency Response) of this Consent Decree shall be under the direction and supervision of the Supervising Contractor, the selection of which shall be subject to disapproval by EPA after a reasonable opportunity for review and comment by the State. In the event Settling Defendants' selected Supervising Contractor has not been approved prior to lodging of this Consent Decree, within 20 days after the lodging of this Consent Decree, Settling Defendants shall notify EPA and the State in writing of the name, title, and qualifications of any contractor proposed to be the Supervising Contractor. With respect to any contractor proposed to be Supervising Contractor, Settling Defendants shall

demonstrate that the proposed contractor has a quality system that complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), by submitting a copy of the proposed contractor's Quality Management Plan (QMP). The QMP should be prepared in accordance with "EPA Requirements for Quality Management Plans (QA/R-2)" (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA will issue a notice of disapproval or an authorization to proceed. If at any time thereafter, Settling Defendants propose to change a Supervising Contractor, Settling Defendants shall give such notice to EPA and the State and must obtain an authorization to proceed from EPA, after a reasonable opportunity for review and comment by the State, before the new Supervising Contractor performs, directs, or supervises any Work under this Consent Decree.

b. If EPA disapproves a proposed Supervising Contractor, EPA will notify Settling Defendants in writing. Settling Defendants shall submit to EPA and the State a list of contractors, including the qualifications of each contractor, that would be acceptable to them within 30 days of receipt of EPA's disapproval of the contractor previously proposed. EPA will provide written notice of the names of any contractor(s) that it disapproves and an authorization to proceed with respect to any of the other contractors. Settling Defendants may select any contractor from that list that is not disapproved and shall notify EPA and the State of the name of the contractor selected within 21 days of EPA's authorization to proceed.

c. If EPA fails to provide written notice of its authorization to proceed or disapproval as provided in this Paragraph and this failure prevents the Settling Defendants from meeting one or more deadlines in a plan approved by the EPA pursuant to this Consent Decree,

Settling Defendants may seek relief under the provisions of Section XVIII (Force Majeure) hereof.

11. Remedial Design.

The final Remedial Design Reports (“RDRs”), and Operations, Maintenance, and Monitoring Plans (“OMMPs”), approved by EPA, are incorporated into and enforceable under the Consent Decree as attachments to the Statement of Work at Appendix B.

12. Remedial Action.

a. Within 30 days after lodging of this Consent Decree, or (in the event that Settling Defendants’ Supervising Contractor has not been approved prior to lodging), within thirty (30) days after EPA approval of the Supervising Contractor, Settling Defendants shall submit to EPA and the State a work plan (“Remedial Action Work Plan”) for the performance of the Remedial Action at the Site. The Remedial Action Work Plan shall provide for construction and implementation of the remedy set forth in the ROD and achievement of the Performance Standards, in accordance with this Consent Decree, the ROD, the SOW, and the final EPA-approved RDRs and OMMPs attached to the SOW. Upon its approval by EPA, the Remedial Action Work Plan shall be incorporated into and become enforceable under this Consent Decree. At the same time as they submit the Remedial Action Work Plan, Settling Defendants shall submit to EPA and the State a Health and Safety Plan for field activities required by the Remedial Action Work Plan which conforms to the applicable Occupational Safety and Health Administration and EPA requirements including, but not limited to, 29 C.F.R. § 1910.120.

b. The Remedial Action Work Plan shall address all activities, selection of methodologies, plans, and schedules required by the Statement of Work. The Remedial Action Work Plan shall also include a schedule for implementation of all components of the Remedial

Action in the Statement of Work and shall identify the initial formulation of the Settling Defendants' Remedial Action Project Team (including, but not limited to, the Supervising Contractor).

c. Upon approval of the Remedial Action Work Plan by EPA, after a reasonable opportunity for review and comment by the State, Settling Defendants shall implement the activities required under the Remedial Action Work Plan. The Settling Defendants shall submit to EPA and the State all plans, submittals, or other deliverables required under the approved Remedial Action Work Plan in accordance with the approved schedule for review and approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Unless otherwise directed by EPA, Settling Defendants shall not commence physical Remedial Action activities at the Site prior to approval of the Remedial Action Work Plan.

13. The Settling Defendants shall continue to implement the Remedial Action and O&M until the Performance Standards are achieved and for so long thereafter as is otherwise required under this Consent Decree.

14. Modification of the SOW or Related Work Plans.

a. If EPA, after consultation with the TCEQ, determines that modification to the work specified in the SOW and/or in work plans developed pursuant to the SOW is necessary to achieve and maintain the Performance Standards or to carry out and maintain the effectiveness of the remedy set forth in the ROD, EPA may require that such modification be incorporated in the SOW and/or such work plans, provided, however, that a modification may only be required pursuant to this Paragraph to the extent that it is consistent with the scope of the remedy selected in the ROD.

b. For the purposes of this Paragraph 14 and Paragraphs 52 and 53 only, the “scope of the remedy selected in the ROD” is the collection of response actions to be conducted on the Bay System, the Chlor-Alkali Process Area, and the Former Witco Area, as specifically described in the ROD at Section 12, “Selected Remedy.”

c. If Settling Defendants object to any modification determined by EPA to be necessary pursuant to this Paragraph, they may seek dispute resolution pursuant to Section XIX (Dispute Resolution), Paragraph 70 (record review). The SOW and/or related work plans shall be modified in accordance with final resolution of the dispute.

d. Settling Defendants shall implement any work required by any modifications incorporated in the SOW and/or in work plans developed pursuant to the SOW in accordance with this Paragraph.

e. Nothing in this Paragraph shall be construed to limit EPA's authority to require performance of further response actions as otherwise provided in this Consent Decree.

15. Settling Defendants acknowledge and agree that nothing in this Consent Decree; the SOW; the Remedial Design Reports; the Operations, Maintenance and Monitoring Plans; or Remedial Action Work Plan constitutes a warranty or representation of any kind by Plaintiffs that compliance with the work requirements set forth in the SOW, the Work Plans, and other EPA-approved plans will achieve the Performance Standards.

16. Settling Defendants shall, prior to any off-site shipment of Waste Material from the Site to an out-of-state waste management facility, provide written notification to the appropriate state environmental official in the receiving facility's state and to the EPA Project Coordinator of such shipment of Waste Material. However, this notification requirement shall not apply to any off-site shipments when the total volume of all such shipments will not exceed 10 cubic yards.

a. The Settling Defendants shall include in the written notification the following information, where available: (1) the name and location of the facility to which the Waste Material is to be shipped; (2) the type and quantity of the Waste Material to be shipped; (3) the expected schedule for the shipment of the Waste Material; and (4) the method of transportation. The Settling Defendants shall notify the state in which the planned receiving facility is located of major changes in the shipment plan, such as a decision to ship the Waste Material to another facility within the same state, or to a facility in another state.

b. The identity of the receiving facility and state will be determined by the Settling Defendants following the award of the contract for Remedial Action construction. The Settling Defendants shall provide the information required by Paragraph 16.a as soon as practicable after the award of the contract and before the Waste Material is actually shipped.

c. Before the initial shipment of any hazardous substances, pollutants, or contaminants from the Site generated as a result of the Remedial Action required under this Consent Decree to an off-site location, and annually thereafter, Settling Defendants shall obtain EPA's certification that the proposed receiving facility is operating in compliance with the requirements of CERCLA Section 121(d)(3) and 40 C.F.R. § 300.440. Settling Defendants shall not knowingly send hazardous substances, pollutants, or contaminants from the Site to an off-site facility that does not comply with the requirements of the statutory provision and regulations cited in the preceding sentence.

## **VII. REMEDY REVIEW**

17. Periodic Review. Settling Defendants shall conduct any studies and investigations as requested by EPA, in order to permit EPA to conduct reviews of whether the Remedial Action is



protective of human health and the environment at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

18. Selection of Further Response Actions. If EPA, after consultation with the TCEQ, determines, at any time, that the Remedial Action is not protective of human health and the environment, EPA may select further response actions for the Site in accordance with the requirements of CERCLA and the NCP.

19. Opportunity To Comment. Settling Defendants and, if required by Sections 113(k)(2) or 117 of CERCLA, the public, will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the comment period.

20. Settling Defendants' Obligation To Perform Further Response Actions. If EPA selects further response actions for the Site, the Settling Defendants shall undertake such further response actions to the extent that the reopener conditions in Paragraph 86 or Paragraph 87 (United States' reservations of liability based on unknown conditions or new information) are satisfied. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution) to dispute (1) EPA's determination that the reopener conditions of Paragraph 86 or Paragraph 87 of Section XXI (Covenants Not To Sue by Plaintiffs) are satisfied, (2) EPA's determination that the Remedial Action is not protective of human health and the environment, or (3) EPA's selection of the further response actions. Disputes pertaining to the whether the Remedial Action is protective or to EPA's selection of further response actions shall be resolved pursuant to Paragraph 70 (record review).

21. Submissions of Plans. If Settling Defendants are required to perform the further response actions pursuant to Paragraph 20, they shall submit a plan for such work to EPA and TCEQ for approval in accordance with the procedures set forth in Section VI (Performance of the Work by Settling Defendants) and shall implement the plan approved by EPA, after consultation with the TCEQ, in accordance with the provisions of this Decree.

#### **VIII. QUALITY ASSURANCE, SAMPLING, AND DATA ANALYSIS**

22. Settling Defendants shall use quality assurance, quality control, and chain of custody procedures for all treatability, design, compliance and monitoring samples in accordance with “EPA Requirements for Quality Assurance Project Plans (QA/R5)” (EPA/240/B-01/003, March 2001) “Guidance for Quality Assurance Project Plans (QA/G-5)” (EPA/600/R-98/018, February 1998), and subsequent amendments to such guidelines upon notification by EPA to Settling Defendants of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, Settling Defendants shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a Quality Assurance Project Plan (“QAPP”) that is consistent with the SOW, the NCP and applicable guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. Settling Defendants shall include in contracts with laboratories utilized by Settling Defendants in implementing this Consent Decree contractual provisions for the benefit of EPA and the State providing EPA and the State personnel and their authorized representatives with access at reasonable times to such laboratories. In addition, Settling Defendants shall ensure that such laboratories shall analyze all samples submitted by EPA

pursuant to the QAPP for quality assurance monitoring. Settling Defendants shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Consent Decree perform all analyses according to accepted EPA methods. Accepted EPA methods consist of those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988, and any amendments made thereto during the course of the implementation of this Consent Decree; however, upon approval by EPA, after opportunity for review and comment by the State, the Settling Defendants may use other analytical methods which are as stringent as or more stringent than the CLP- approved methods. Settling Defendants shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA-equivalent QA/QC program. Settling Defendants shall only use laboratories that have a documented Quality System which complies with ANSI/ASQC E4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," (American National Standard, January 5, 1995), and "EPA Requirements for Quality Management Plans (QA/R-2)," (EPA/240/B-01/002, March 2001) or equivalent documentation as determined by EPA. EPA may consider laboratories accredited under the National Environmental Laboratory Accreditation Program ("NELAP") as meeting the Quality System requirements. Settling Defendants shall ensure that all field methodologies utilized in collecting samples for subsequent analysis pursuant to this Consent Decree will be conducted in accordance with the procedures set forth in the QAPP approved by EPA.

23. Upon request, the Settling Defendants shall allow split or duplicate samples to be taken by EPA and the State or their authorized representatives. Settling Defendants shall notify

EPA and the State not less than 14 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA and the State shall have the right to take any additional samples that EPA or the State deem necessary. Upon request, EPA and the State shall allow the Settling Defendants to take split or duplicate samples of any samples they take as part of the Plaintiffs' oversight of the Settling Defendants' implementation of the Work.

24. Settling Defendants shall submit two hard copies to EPA, one hard copy to the State, and one electronic copy, if available, each to the EPA and the State, of the results of all sampling and/or tests or other data obtained or generated by or on behalf of Settling Defendants with respect to the Site and/or the implementation of this Consent Decree unless EPA agrees otherwise.

25. Notwithstanding any provision of this Consent Decree, the United States and the State hereby retain all of their information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

#### **IX. ACCESS AND INSTITUTIONAL CONTROLS**

26. To the extent that the Site, or any other property where access and/or land/water use restrictions are needed to implement this Consent Decree, is owned or controlled by a Settling Defendant, such Settling Defendant shall:

a. commencing on the date of lodging of this Consent Decree, provide the United States, the State, and their representatives, including EPA and its contractors, with access at all reasonable times to the Site, or such other property, for the purpose of conducting any activity related to this Consent Decree including, but not limited to, the following activities:

- (1) Monitoring the Work;
- (2) Verifying any data or information submitted to the United States or the State;
- (3) Conducting investigations relating to contamination at or near the Site;
- (4) Obtaining samples;
- (5) Assessing the need for, planning, or implementing additional response actions at or near the Site;
- (6) Assessing implementation of quality assurance and quality control practices as defined in the approved Quality Assurance Project Plans;
- (7) Implementing the Work pursuant to the conditions set forth in Paragraph 94 of this Consent Decree;
- (8) Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Defendants or their agents, consistent with Section XXIV (Access to Information);
- (9) Assessing Settling Defendants' compliance with this Consent Decree; and
- (10) Determining whether the Site or other property is being used in a manner that is prohibited or restricted, or that may need to be prohibited or restricted, by or pursuant to this Consent Decree;

b. commencing on the date of lodging of this Consent Decree,

- (1) refrain from using the Site, or such other property, in any manner that would interfere with or adversely affect the implementation, integrity, or protectiveness of the

remedial measures to be performed pursuant to this Consent Decree, provided that, in recognition of Settling Defendants' ongoing operations at the Plant, the foregoing use restriction shall not be considered breached as long as Settling Defendants conduct operations, management and maintenance of the Plant in a manner that minimizes, to the extent practicable, interference with ongoing response actions under this Consent Decree and notifies EPA of any Plant operations or activities that may interfere with scheduled actions or data collection under this Consent Decree in accordance with Paragraph 34; and

(2) maintain as industrial the land use for the areas of the Site identified in the ROD as the Chlor-Alkali Process Area soils and the Former Witco Area soils.

c. if required by EPA, execute and record in the Recorder's Office of Calhoun County, State of Texas, an easement, running with the land, that (i) grants a right of access for the purpose of conducting any activity related to this Consent Decree including, but not limited to, those activities listed in Paragraph 26.a of this Consent Decree, and (ii) grants the right to enforce the land/water use restrictions listed in Paragraph 26.b of this Consent Decree. The Settling Defendants shall grant the access rights and the rights to enforce the land/water use restrictions to (i) the United States, on behalf of EPA, and its representatives and/or (ii) the State and its representatives. If EPA, after consultation with the TCEQ, determines that an easement or enforceable land/water use restriction is necessary, EPA shall notify Settling Defendants, who shall, within 45 days of notification by EPA, submit to EPA and the State for review and approval with respect to such property:

(1) A draft easement that is enforceable under the laws of the State of Texas, and

(2) a current title insurance commitment or some other evidence of title acceptable to EPA, which shows title to the land described in the easement to be free and clear of all prior liens and encumbrances (except when those liens or encumbrances are nonexclusive utility or right of way easements or otherwise approved by EPA or when, despite best efforts, Settling Defendants are unable to obtain release or subordination of such prior liens or encumbrances).

Within 15 days of EPA's approval and acceptance of the easement and the title evidence, Settling Defendants shall update the title search and, if it is determined that nothing has occurred since the effective date of the commitment to affect the title adversely, record the easement with the Recorder's Office of Calhoun County. Within 30 days of recording the easement, Settling Defendants shall provide EPA with a final title insurance policy, or other final evidence of title acceptable to EPA, and a certified copy of the original recorded easement showing the clerk's recording stamps. If the easement is to be conveyed to the United States, the easement and title evidence (including final title evidence) shall be prepared in accordance with the U.S. Department of Justice Title Standards 2001, and approval of the sufficiency of title must be obtained as required by 40 U.S.C. § 255.

27. The Settling Defendants may cancel and rescind any easement for access referred to in Paragraph 26 after all Work has been completed in accordance with Paragraph 53.

28. For purposes of Paragraph 26.c of this Consent Decree, "best efforts" includes the payment of reasonable sums of money in consideration of an agreement to release or subordinate a prior lien or encumbrance. If Settling Defendants are unable to obtain an agreement pursuant to Paragraph 26.c.(1) from the holder of a prior lien or encumbrance to release or subordinate such lien or encumbrance to the easement being created pursuant to this Consent Decree within

45 days after the notification in Paragraph 26.c, Settling Defendants shall promptly notify the United States in writing, and shall include in that notification a summary of the steps that Settling Defendants have taken to attempt to comply with Paragraph 26.c of this Consent Decree. The United States may, as it deems appropriate, assist Settling Defendants in obtaining the release or subordination of a prior lien or encumbrance. Settling Defendants shall reimburse the United States in accordance with the procedures in Section XVI (Payments for Response Costs), for all costs incurred, direct or indirect, by the United States in obtaining such release/subordination of prior liens or encumbrances including, but not limited to, the cost of attorney time and the amount of monetary consideration paid for just compensation.

29. If EPA determines that land/water use restrictions in the form of state or local laws, regulations, ordinances or other governmental controls are needed to implement the remedy selected in the ROD, ensure the integrity and protectiveness thereof, or ensure non-interference therewith, Settling Defendants shall provide information to EPA and the State and cooperate with EPA's and the State's efforts to secure such governmental controls.

30. Notwithstanding any provision of this Consent Decree, the United States and the State retain all of their access authorities and rights, as well as all of their rights to require land/water use restrictions, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulation.

31. Prior to receiving a Certificate of Completion of the Remedial Action pursuant to Paragraph 52 of this Consent Decree, the Settling Defendants shall submit to EPA and the TCEQ for approval deed record documents sufficient to implement the institutional controls specified in the ROD for the soils in the Chlor-Akali Process Area and the Former Witco Area, or other plan approved by EPA pursuant to Paragraph 39, to ensure long-term protectiveness of the remedy for



filing in the County Records of Calhoun County (or other county, if appropriate), Texas. The deed records shall:

a. identify with particularity the location of caps, barriers, and containment systems constructed as part of the Remedial Action to notify future purchasers or users of the property that excavation in these areas may cause a release of hazardous substances to the environment.

b. restrict the construction of any buildings, wells, pipes, roads, ditches, fences, channels, cables, or any other structures – fixtures or otherwise – by any person in a manner not consistent with the ROD, including but not limited to, any action that would disturb the soil or capped sediments, such as digging holes, driving pilings, dredging, trenching (as for pipe or cable), engaging in geophysical exploration, or any other action that could compromise the integrity of the capping or thin-capping constructed on the Site and/or disturb other components of prior response actions conducted on this Site or the Remedial Action performed pursuant to this Consent Decree in a manner not consistent with the ROD.

32. Within fourteen days after approval by EPA, and a reasonable opportunity for review and comment by the State, of the deed record documents prepared by Settling Defendants pursuant to Paragraph 31, the Settling Defendants shall:

a. for property owned or controlled by the Settling Defendants, file the deed record documents in the County Records of Calhoun County (or other county, as appropriate), Texas;

b. for property owned by persons or entities other than Settling Defendants, provide the documents to EPA for transmittal to the relevant property owners for filing in the County Records of Calhoun County (or other county, as appropriate), Texas.

## **X. REPORTING REQUIREMENTS**

33. In addition to any other requirement of this Consent Decree, Settling Defendants shall submit two hard copies to EPA, one hard copy to the State, and one electronic copy, if available, each to EPA and the State, of written monthly progress reports that: (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous month; (b) include a summary of all results of sampling and tests and all other data received or generated by Settling Defendants or their contractors or agents in the previous month; (c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous month; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next six weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that Settling Defendants have proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous month and those to be undertaken in the next six weeks. Settling Defendants shall submit these progress reports to EPA and the State by the tenth day of every month following the lodging of this Consent Decree until completion of construction of the remedial action, as determined by EPA. After completion of construction until EPA notifies the Settling Defendants pursuant to Paragraph 53 of Section XIV (Certification of Completion), Settling Defendants shall submit the required reports on a quarterly basis, or less frequently if approved by EPA after a

reasonable opportunity to comment by the State. If requested by EPA or the State, Settling Defendants shall also provide briefings for EPA and the State to discuss the progress of the Work.

34. The Settling Defendants shall notify EPA and the State of any material change in the schedule described in the monthly progress report for the performance of any activity, including, but not limited to, data collection and implementation of work plans, no later than seven days prior to the performance of the activity.

35. Upon the occurrence of any event during performance of the Work that Settling Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), Settling Defendants shall within 24 hours of the onset of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the Response and Prevention Branch, Region 6, United States Environmental Protection Agency. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

36. Within 20 days of the onset of such an event, Settling Defendants shall furnish to Plaintiffs a written report, signed by the Settling Defendants' Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, Settling Defendants shall submit a report setting forth all actions taken in response thereto.

37. Settling Defendants shall submit three hard copies and one electronic copy of all plans, reports, and data required by the SOW, the Remedial Design Work Plan, the Remedial

Action Work Plan, or any other approved plans to EPA in accordance with the schedules set forth in such plans. Settling Defendants shall simultaneously submit two hard copies and one electronic copy of all such plans, reports and data to the State. Upon request by EPA Settling Defendants shall submit in electronic form all portions of any report or other deliverable Settling Defendants are required to submit pursuant to the provisions of this Consent Decree.

38. All reports and other documents submitted by Settling Defendants to EPA (other than the monthly progress reports referred to above) which purport to document Settling Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendants.

#### **XI. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS**

39. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendants modify the submission; or (e) any combination of the above. However, EPA shall not modify a submission without first providing Settling Defendants at least one notice of deficiency and an opportunity to cure within 15 days, except where to do so would cause serious disruption to the Work or where previous submission(s) have been disapproved due to material defects and the deficiencies in the submission under consideration indicate a bad faith lack of effort to submit an acceptable deliverable.

40. In the event of approval, approval upon conditions, or modification by EPA, pursuant to Paragraph 39(a), (b), or (c), Settling Defendants shall proceed to take any action required by

the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XIX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission to cure the deficiencies pursuant to Paragraph 39(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XX (Stipulated Penalties).

41. Resubmission of Plans.

a. Upon receipt of a notice of disapproval pursuant to Paragraph 39(d), Settling Defendants shall, within 15 days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XX (Stipulated Penalties), shall accrue during the 15-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraphs 42 and 43.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 39(d), Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendants of any liability for stipulated penalties under Section XX (Stipulated Penalties).

42. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Settling Defendants to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to modify or develop the plan, report or other item. Settling Defendants shall implement any such plan, report, or item as

modified or developed by EPA, subject only to their right to invoke the procedures set forth in Section XIX (Dispute Resolution).

43. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect, Settling Defendants shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the Settling Defendants invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XIX (Dispute Resolution) and Section XX (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XX (Stipulated Penalties).

44. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, the approved or modified portion shall be enforceable under this Consent Decree.

## **XII. PROJECT COORDINATORS**

45. Within 20 days of lodging this Consent Decree, Settling Defendants, the State and EPA will notify each other, in writing, of the name, address, and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other Parties at least five (5) Working Days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The

Settling Defendants' Project Coordinator shall be subject to disapproval by EPA, after consultation with the TCEQ, and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendants' Project Coordinator shall not be an attorney for Settling Defendants in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

46. Plaintiffs may designate other representatives, including, but not limited to, EPA and State employees, and Federal and State contractors and consultants, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager ("RPM") and an On-Scene Coordinator ("OSC") by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when s/he determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

47. EPA's Project Coordinator and the Settling Defendants' Project Coordinator will meet, at a minimum, on a monthly basis, unless otherwise agreed to by such Project Coordinators. After completion of construction, as determined by EPA, the Project Coordinators may agree to meet quarterly, or on a less frequent basis than monthly. The State's Project Coordinator may attend the Project Coordinators' meeting.

### **XIII. ASSURANCE OF ABILITY TO COMPLETE WORK**

48. Within 30 days of entry of this Consent Decree, Settling Defendants shall establish and maintain financial security in the amount of \$11,400,000 in one or more of the following forms:

- a. A surety bond guaranteeing performance of the Work;
- b. One or more irrevocable letters of credit equaling the total estimated cost of the Work;
- c. A trust fund;
- d. A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with Settling Defendants;
- e. A demonstration that Settling Defendants satisfy the requirements of 40 C.F.R. Part 264.143(f); or
- f. Other financial mechanism acceptable to EPA, after a reasonable opportunity for review and comment by the State, funded sufficiently to perform the work and other obligations required under this Consent Decree.

49. If the Settling Defendants seek to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 48.d of this Consent Decree, Settling Defendants shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If Settling Defendants seek to demonstrate their ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 48.d or 48.e, they shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the Effective Date. In the event that EPA, after a reasonable



opportunity for review and comment by the State, determines at any time that the financial assurances provided pursuant to this Section are inadequate, Settling Defendants shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 48 of this Consent Decree. Settling Defendants' inability to demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

50. If Settling Defendants can show that the estimated cost to complete the remaining Work has diminished below the amount set forth in Paragraph 48 above after entry of this Consent Decree, Settling Defendants may, on any anniversary date of entry of this Consent Decree, or at any other time agreed to by the Parties, reduce the amount of the financial security provided under this Section to the estimated cost of the remaining work to be performed. Settling Defendants shall submit a proposal for such reduction to EPA, in accordance with the requirements of this Section, and may reduce the amount of the security upon approval by EPA. In the event of a dispute, Settling Defendants may reduce the amount of the security in accordance with the final administrative or judicial decision resolving the dispute.

51. Settling Defendants may change the form of financial assurance provided under this Section at any time, upon notice to and approval by EPA, after consultation with the TCEQ, provided that the new form of assurance meets the requirements of this Section. In the event of a dispute, Settling Defendants may change the form of the financial assurance only in accordance with the final administrative or judicial decision resolving the dispute.

#### XIV. CERTIFICATION OF COMPLETION

##### 52. Completion of the Remedial Action.

a. Within 90 days after Settling Defendants conclude that the Remedial Action has been fully performed and the Performance Standards have been attained, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants, EPA, and the State. If, after the pre-certification inspection, the Settling Defendants still believe that the Remedial Action has been fully performed and the Performance Standards have been attained, they shall submit a written report requesting certification to EPA for approval, with a copy to the State, pursuant to Section XI (EPA Approval of Plans and Other Submissions) within 30 days of the inspection. In the report, a registered professional engineer and the Settling Defendants' Project Coordinator shall state that the Remedial Action has been completed in full satisfaction of the requirements of this Consent Decree. The written report shall include as-built drawings signed and stamped by a professional engineer. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendants or the Settling Defendants' Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after completion of the pre-certification inspection and receipt and review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that the Remedial Action or any portion thereof has not been completed in accordance with this Consent Decree or that the Performance Standards have not been achieved, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants

pursuant to this Consent Decree to complete the Remedial Action and achieve the Performance Standards, provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the “scope of the remedy selected in the ROD,” as that term is defined in Paragraph 14.b EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established pursuant to this Paragraph, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent report requesting Certification of Completion and after a reasonable opportunity for review and comment by the State, that the Remedial Action has been performed in accordance with this Consent Decree and that the Performance Standards have been achieved, EPA will so certify in writing to Settling Defendants. This certification shall constitute the Certification of Completion of the Remedial Action for purposes of this Consent Decree, including, but not limited to, Section XXI (Covenants Not to Sue by Plaintiffs). Certification of Completion of the Remedial Action shall not affect Settling Defendants’ obligations under this Consent Decree.

### 53. Completion of the Work.

a. Within 90 days after Settling Defendants conclude that all phases of the Work (including O & M) have been fully performed, Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by Settling Defendants, EPA and the State. If, after the pre-certification inspection, the Settling Defendants still believe that the Work has been fully

performed, Settling Defendants shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of Settling Defendants or the Settling Defendants' Project Coordinator:

To the best of my knowledge, after thorough investigation, I certify that the information contained in or accompanying this submission is true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

If, after review of the written report, EPA, after reasonable opportunity to review and comment by the State, determines that any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify Settling Defendants in writing of the activities that must be undertaken by Settling Defendants pursuant to this Consent Decree to complete the Work, provided, however, that EPA may only require Settling Defendants to perform such activities pursuant to this Paragraph to the extent that such activities are consistent with the "scope of the remedy selected in the ROD," as that term is defined in Paragraph 14.b. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XI (EPA Approval of Plans and Other Submissions). Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution).

b. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by Settling Defendants and after a reasonable opportunity for review

and comment by the State, that the Work has been performed in accordance with this Consent Decree, EPA will so notify the Settling Defendants in writing.

#### **XV. EMERGENCY RESPONSE**

54. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, Settling Defendants shall, subject to Paragraph 55, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release, and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Settling Defendants shall notify the EPA Response and Prevention Branch, Region 6. Settling Defendants shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that Settling Defendants fail to take appropriate response action as required by this Section, and EPA or, as appropriate, the State takes such action instead, Settling Defendants shall reimburse EPA and the State all costs of the response action not inconsistent with the NCP pursuant to Section XVI (Payments for Response Costs).

55. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States, or the State, a) to take all appropriate action to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, or b) to direct or order such action, or seek an order from the Court, to protect human health and the environment or to prevent,

abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site, subject to Section XXI (Covenants Not to Sue by Plaintiffs).

## **XVI. PAYMENTS FOR RESPONSE COSTS**

### **56. Payments for Past and Interim Response Costs.**

#### **a. State Past Response Costs**

Within 30 days of the Effective Date, Settling Defendants shall pay to the State \$199,086.33 for State Past Response Costs. Of this sum, \$100,000 shall be allocated to the Office of the Attorney General for attorneys fees and costs. If paid by check, the payment shall be mailed to the Chief, Natural Resources Division, Attorney General's Office, P.O. Box 12548, Austin, Texas 78711 and shall bear the identifying number "AG#9137803".

#### **b. United States Past Response Costs**

i. By Administrative Order on Consent concluded on March 31, 1994, Alcoa Inc. agreed to perform the Remedial Investigation and Feasibility Study ("RI/FS") and certain removal actions for the Site, and to reimburse EPA response costs in connection with the order. In the Matter of Alcoa (Point Comfort)/Lavaca Bay Superfund Site, U.S. EPA CERCLA Docket No. 6-11-94 ("the AOC"). The AOC was amended by agreement of the parties in a Modification concluded on September 27, 1995, to provide for prospective payment of EPA AOC response costs (as defined in the AOC) through a reimbursable special account ("Alcoa RI/FS RUB Account") established within the Hazardous Substance Trust Fund to receive funds dedicated to EPA RI/FS response costs for this Site. The Modification provides, inter alia, that "EPA shall remit and return to Respondent [Alcoa Inc.] the balance of funds, if any, in the Alcoa [RI/FS] RUB Account on the date of termination of this Consent Order." Modification, ¶ 106(d), p. 3.

ii. As of September 30, 2003, the RI/FS AOC had not been terminated.

The Alcoa RI/FS RUB Account has not been closed and a final accounting has not been completed. EPA working papers indicate that as of September 30, 2003, the Alcoa RI/FS RUB Account contained an available balance of \$228,266 together with accrued interest in the amount of \$178,713.00, for a total of \$406,979.

iii. EPA has incurred unreimbursed Past Response Costs through September 30, 2003, in the amount of \$379,280. In addition, DOJ has incurred unreimbursed Past Response Costs in the amount of \$25,446 for the same time period. The United States (EPA and DOJ) has total unreimbursed Past Response Costs through September 30, 2003, in the amount of \$404,726.

iv. The United States and the Settling Defendants agree that \$404,726 of funds remaining in the Alcoa RI/FS RUB Account shall be applied on or after the Effective Date of this Consent Decree to pay in full the United States' unreimbursed Past Response Costs.

v. The Parties agree that this Consent Decree supersedes and abrogates Paragraph 107.d. of the AOC as to disposition of the balance of funds in the Alcoa RI/FS RUB Account.

c. Interim Response Costs.

i. EPA and DOJ have incurred and will incur and continue to pay Interim Response Costs.

ii. EPA has initiated the process to close and render a final accounting for the Alcoa RI/FS RUB Account.

iii. The United States and the Settling Defendants agree that the balance of funds remaining in the Alcoa RI/FS RUB Account at the time the account is closed as shown

by the final, audited accounting, shall be applied to pay EPA's and DOJ's Interim Response Costs.

iv. EPA's Interim Response Costs shall be summarized in the form of an unreconciled Superfund Cost Recovery Package Imaging and Online System (SCORPIOS) Report and/or equivalent unreconciled EPA accounting summary. DOJ's Interim Response Costs may be provided separately in summary form by DOJ or may be reflected as part of EPA's Interim Response Costs.

v. If the balance in the Alcoa RI/FS RUB Account at the time the account is closed, as shown in the final, audited accounting, exceeds the amount of the unreimbursed Interim Response Costs, the remainder will be transferred from the Alcoa RI/FS RUB Account into the Alcoa Remedial Design/Remedial Action Special Account ("RD/RA Special Account") to be applied toward Future Response Costs and the Alcoa RI/FS RUB Account will be closed.

vi. If the balance in the Alcoa RI/FS RUB Account at the time the account is closed, as shown in the final, audited accounting, is less than the amount of the Interim Response Costs, the remainder will be transferred from the Alcoa RI/FS RUB Account into the RD/RA Special Account to be applied toward the Interim Response Costs. Within 30 days of the date of receipt of a demand from EPA for the remaining Interim Response Costs, Settling Defendants shall complete payment of the remaining Interim Response Costs in accordance with the Payment Procedures as specified by Subparagraph 56.d, provided that Settling Defendants shall have the right to seek additional information or invoke Dispute Resolution prior to the payment of such Interim Response Costs under the procedures set forth in Paragraph 57.



vii. The Parties agree that this Consent Decree supersedes and abrogates Paragraph 107.d. of the AOC as to disposition of the balance of funds in the Alcoa RI/FS RUB Account.

d. Payment Procedures.

i. Payment of Interim Response Costs, if required by Subparagraph 56.c.vi., shall be made by FedWire Electronic Funds Transfer (“EFT”) to the U.S. Department of Justice account in accordance with current EFT procedures, referencing USAO File Number 2004V00667, EPA Site/Spill ID Number 06NC, and DOJ Case Number 90-11-3-655/2.

Payment shall be made in accordance with instructions provided to the Settling Defendants by the Financial Litigation Unit of the United States Attorney’s Office for the Southern District of Texas, Victoria Division, following lodging of the Consent Decree. Any payments received by the Department of Justice after 4:00 p.m. (Eastern Time) will be credited on the next business day.

ii. At the time of payment, Settling Defendants shall send notice that payment has been made to the United States and to EPA, in accordance with Section XXVI (Notices and Submissions). Settling Defendants shall also send notice to the Chief, Cost Recovery Section, U.S. EPA Region 6 (6SF-AC), 1445 Ross Ave., Suite 1200, Dallas, TX 75202.

iii. The total amount to be paid by Settling Defendants pursuant to Subparagraph 56.c.vi, if any, shall be deposited in the RD/RA Special Account, within the EPA Hazardous Substance Trust Fund, to be retained and used to conduct or finance response actions at or in connection with the Site, to be transferred by EPA to the EPA Hazardous Substance Trust

Fund, or to be used in support of prior disbursements for cleanup activities at or in connection with this Site.

**57. Payments for Future Response Costs.**

a. Settling Defendants shall pay to EPA all Future Response Costs not inconsistent with the National Contingency Plan. Future Response Costs to be paid by Settling Defendants pursuant to this Paragraph shall be deposited in the RD/RA Special Account within the EPA Hazardous Substance Trust Fund to be retained and used to conduct or finance response actions at or in connection with the Site, to be transferred by EPA to the EPA Hazardous Substance Trust Fund, or to be used in support of prior disbursements for cleanup activities at or in connection with this Site.

b. EPA has estimated that the amount of Future Response Costs that will be expended at this Site on an annual basis during construction of the Remedial Action will be \$100,000. Based on this estimate, within twenty (20) days after the Effective Date of this Consent Decree, Settling Defendants shall forward an initial payment of \$100,000 to be deposited in the RD/RA Special Account, within the EPA Hazardous Substance Trust Fund, to be retained and used to conduct or finance response actions at or in connection with the Site. Payment shall be made by Electronic Funds Transfer ("EFT"), in accordance with EFT instructions provided by EPA, or by submitting a money order, cashier's check, or certified check payable to the EPA Hazardous Substance Trust Fund to: U.S. Environmental Protection Agency, Region 6, P.O. Box 371099M, Pittsburgh, PA 15251.

c. Settling Defendants shall clearly mark the check or other transaction record "Acct. #(Alcoa) 061J" and shall reference DOJ Case No. #90-11-3-655/2 and U.S.A.O. Case No. 2004V00667.

d. Settling Defendants shall submit notice of such payment including a copy of EFT transmittal documentation, money order, cashier's check, or certified check to the Chief, Cost Recovery Section (6SF-AC), Superfund Division, U.S. Environmental Protection Agency Region 6, 1445 Ross Ave., Suite 1200, Dallas, TX 75202-2733, and to the Chief, Environmental Enforcement Section, U.S. Department of Justice, at the address specified in Paragraph 112.

e. When EPA has expended direct and indirect Future Response Costs totaling approximately \$80,000 (that is, when approximately \$20,000 of available funds remain in the RD/RA Special Account), EPA will notify Settling Defendants. At that time, EPA will provide an adjusted estimate, determined by the EPA RPM, of Future Response Costs to be expended in the future. Periodically, but no less than annually, EPA will submit to Settling Defendants a summary of Future Response Costs expended from the RD/RA Special Account. The Future Response Costs accounting summary shall be in the form of an unreconciled Superfund Cost Recovery Package Imaging and Online System (SCORPIOS) Report or equivalent unreconciled EPA accounting summary.

f. If Settling Defendants need any financial information or work performed information about a specific cost line item on the SCORPIOS Report, Settling Defendants shall contact in writing the EPA RPM assigned to the Site to inquire about specific details. The RPM, in consultation with the Chief of the Accounting Section, the Chief of the Cost Recovery Section, the Site attorney, or other Agency personnel as appropriate, shall within fourteen (14) days of such contact use his/her best efforts to provide the requested information. After the expiration of this fourteen (14) day period, Settling Defendants may request that EPA prepare and certify a Cost Package for the costs in question. The cost of preparing the Certified Cost Package shall be a Future Response Cost payable out of the RD/RA Special Account.

g. Settling Defendants shall, within thirty (30) days of receipt of the notice and the Future Response Cost accounting summary described in Paragraph 57.e, remit to the account identified in and in accordance with the procedures described in Paragraph 57.b and c above, by EFT or by money order, certified or cashier's check, the amount stated in the notice, either the amount necessary to replenish the RD/RA Account to an adjusted estimate of Future Response Costs to be expended in the future, or the amount necessary to replenish the account to a balance of the estimated annual Future Response Costs of \$100,000. Settling Defendants shall provide notice of such payment in accordance with Paragraph 57.d above. The due date for payment to replenish the RD/RA Special Account shall not be delayed by dispute resolution, a request for or provision of information about a specific cost line item, or a request for or preparation of a certified Cost Package.

h. In the event that the RD/RA Special Account is depleted to an amount of \$10,000 or less before EPA submits a notification and cost accounting summary to Settling Defendants, Settling Defendants agree, within thirty (30) days of notice from EPA, to remit \$15,000 for deposit in the RD/RA Special Account in accordance with the procedure described in subparagraphs 57.b and c. Notice of such remittance shall be made in accordance with subparagraph 57.d. Settling Defendants shall remit the remaining amount to replenish the RD/RA Account to \$100,000 or to the full amount of the RPM's estimate of Future Response Costs established pursuant to subparagraph 57.e. Payment shall be made in accordance with the procedures outlined in subparagraphs 57.b, and notice given to EPA in accordance with subparagraphs 57.c and d.

i. EPA shall remit and return to Settling Defendants the balance of Future Response Cost funds paid by Settling Defendants, if any, in the RD/RA Special Account on the date of termination of this Consent Decree.

j. Settling Defendants may invoke the Dispute Resolution provisions of this Consent Decree regarding Future Response Costs only after Settling Defendants have made the inquiry of the EPA RPM outlined in Paragraph 57.f above, and the RPM has responded or failed to respond within the fourteen (14) day period. Settling Defendants agree to limit any disputes concerning Future Response Costs to accounting errors and the inclusion of costs outside the scope of this Consent Decree.

58. Settling Defendants may contest payment of any Future Response Costs under Paragraph 57 if they determine that the United States or the State has made an accounting error or if they allege that a cost item is outside the scope of this Consent Decree. Any objection to the Future Response Costs shall be made in writing within 30 days of receipt of the bill and must be sent to the United States (if the United States' accounting is being disputed) or the State (if the State's accounting is being disputed) pursuant to Section XXVI (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. If the United States or the State prevails in the dispute, within 5 days of the resolution of the dispute, the Settling Defendants shall pay the sums due (with accrued Interest) to the United States or the State, if State costs are disputed, in the manner described in subparagraphs 57.a-d unless such sums may be deducted from the RD/RA Special Account. If Settling Defendants prevail in dispute resolution of Future Response Costs, EPA will make adjustments to the RD/RA Special Account to reflect the correct amount determined in the resolution of the dispute. The dispute resolution procedures set forth in this Paragraph in conjunction with the

procedures set forth in Section XIX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendants' obligation to reimburse the United States and the State for their Future Response Costs.

59. In the event that the payments required by Paragraph 56, Paragraph 57, or Paragraph 58 are not made within 30 days of the Settling Defendants' receipt of the bill, Settling Defendants shall pay Interest on the unpaid balance. The Interest to be paid on the unpaid balance of Interim Response Costs or Future Response Costs shall begin to accrue on the date of the bill. The Interest shall accrue through the date of the Settling Defendants' payment. Payments of Interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of Settling Defendants' failure to make timely payments under this Section including, but not limited to, payment of stipulated penalties pursuant to Paragraph 79. The Settling Defendants shall make all payments required by this Paragraph in the manner described in Paragraph 57, as appropriate. Interest shall not be payable on Future Response Costs pursuant to 42 U.S.C. § 9607(a) to the extent sufficient funds exist in the RD/RA Special Account to cover the expenditure when made.

## **XVII. INDEMNIFICATION AND INSURANCE**

### **60. Settling Defendants' Indemnification of the United States and the State.**

a. The United States and the State do not assume any liability by entering into this agreement or by virtue of any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Settling Defendants shall indemnify, save and hold harmless the United States, the State, and their officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, negligent or other wrongful acts or omissions of Settling Defendants, their

officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Settling Defendants agree to pay the United States and the State all costs they incur including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States or the State based on negligent or other wrongful acts or omissions of Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. Neither the United States nor the State shall be held out as a party to any contract entered into by or on behalf of Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendants nor any such contractor shall be considered an agent of the United States or the State.

b. The United States and the State shall give Settling Defendants notice of any claim for which the United States or the State plans to seek indemnification pursuant to Paragraph 60, and shall consult with Settling Defendants prior to settling such claim.

61. Settling Defendants waive all claims against the United States and the State for damages or reimbursement or for set-off of any payments made or to be made to the United States or the State, arising from or on account of any contract, agreement, or arrangement between Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, Settling Defendants shall indemnify and hold harmless the United States and the State with respect to any and all claims for damages or reimbursement arising from or on account of any contract,

agreement, or arrangement between any one or more of Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays.

62. Prior to commencing any on-site Work under this Consent Decree, Settling Defendants shall secure, and shall maintain in force until the first anniversary of EPA's Certification of Completion of the Remedial Action pursuant to Subparagraph 52.b. of Section XIV (Certification of Completion) commercial general liability insurance for bodily injury and property damage, including contractual liability insurance and automobile liability insurance, with limits of \$2 million, combined single limit per occurrence and in the aggregate, for each coverage, naming as additional insureds the United States and the State. In addition, for the duration of this Consent Decree, Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of Settling Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, and annually thereafter on the anniversary of the Effective Date of this Consent Decree, Settling Defendants shall provide to EPA and the State certificates of such insurance. Respondents may satisfy the insurance limits specified herein with any combination of primary and excess/umbrella insurance policies. If Settling Defendants demonstrate by evidence satisfactory to EPA and the State that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to that contractor or subcontractor, Settling Defendants need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor.



### **XVIII. FORCE MAJEURE**

63. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendants, of any entity controlled by Settling Defendants, or of Settling Defendants' contractors, that delays or prevents the performance of any obligation under this Consent Decree despite Settling Defendants' best efforts to fulfill the obligation. The requirement that the Settling Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work or a failure to attain the Performance Standards.

64. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, the Director of the Superfund Division, EPA Region 6, within twelve (12) hours of when Settling Defendants first knew that the event might cause a delay. Within three (3) days thereafter, Settling Defendants shall provide in writing to EPA and the State an explanation and description of the reasons for the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendants' rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendants, such event may cause or

contribute to an endangerment to public health, welfare or the environment. The Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude Settling Defendants from asserting any claim of force majeure for that event for the period of time of such failure to comply, and for any additional delay caused by such failure. Settling Defendants shall be deemed to know of any circumstance of which Settling Defendants, any entity controlled by Settling Defendants, or Settling Defendants' contractors knew or should have known.

65. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA, after a reasonable opportunity for review and comment by the State, for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA, after a reasonable opportunity for review and comment by the State, does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Settling Defendants in writing of its decision. If EPA, after a reasonable opportunity for review and comment by the State, agrees that the delay is attributable to a force majeure event, EPA will notify the Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

66. If the Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XIX (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's

notice. In any such proceeding, Settling Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that Settling Defendants complied with the requirements of Paragraphs 63 and 64, above. If Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by Settling Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

#### **XIX. DISPUTE RESOLUTION**

67. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United States or the State to enforce obligations of the Settling Defendants that have not been disputed in accordance with this Section.

68. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

#### **69. Statements of Position.**

a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding

unless, within ten (10) days after the conclusion of the informal negotiation period, Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on the United States and the State a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendants. The Statement of Position shall specify the Settling Defendants' position as to whether formal dispute resolution should proceed under Paragraph 70 or Paragraph 71.

b. Within twenty one (21) days after receipt of Settling Defendants' Statement of Position, EPA will serve on Settling Defendants its Statement of Position, including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under Paragraph 70 or 71. Within ten (10) days after receipt of EPA's Statement of Position, Settling Defendants may submit a Reply.

c. If there is disagreement between EPA and the Settling Defendants as to whether dispute resolution should proceed under Paragraph 70 or 71, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Settling Defendants ultimately appeal to the Court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in Paragraphs 70 and 71.

70. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set

forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by Settling Defendants regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Section. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Superfund Division, EPA Region 6, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 70.a. This decision shall be binding upon the Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 70.c. and d.

c. Any administrative decision made by EPA pursuant to Paragraph 70.b. shall be reviewable by this Court, provided that a motion for judicial review of the decision is filed by the Settling Defendants with the Court and served on all Parties within 10 days of receipt of EPA's decision. The motion shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to Settling Defendants' motion.

d. In proceedings on any dispute governed by this Paragraph, Settling Defendants shall have the burden of demonstrating that the decision of the Superfund Division Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision, as the case may be, shall be on the administrative record compiled pursuant to Paragraph 70.

71. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law shall be governed by this Paragraph.

a. Following receipt of Settling Defendants' Statement of Position submitted pursuant to Paragraph 69, the Director of the Superfund Division, EPA Region 6 will issue a final decision resolving the dispute. For disputes regarding State Future Response Costs, the TCEQ Remediation Division Director will issue a final decision resolving the dispute. The decision of the Superfund Division Director (or TCEQ equivalent concerning State Future Response Costs) shall be binding on the Settling Defendants unless, within 10 days of receipt of the decision, the Settling Defendants file with the Court and serve on the parties a motion for judicial review of the decision setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States (or the State) may file a response to Settling Defendants' motion.

b. Notwithstanding Paragraph O of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable principles of law.

72. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendants under this Consent Decree, not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 81. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendants do not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XX (Stipulated Penalties).

#### **XX. STIPULATED PENALTIES**

73. Settling Defendants shall be liable to the United States, and separately to the State with respect to compliance with State cost reimbursement provisions, for stipulated penalties in the amounts set forth in Paragraphs 74-76 for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XVIII (Force Majeure). “Compliance” by Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan or report approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree. “Compliance” by Settling Defendants for the State shall mean payment of Past and Future Response Costs as provided in Paragraphs 56 and 57.

74. Stipulated Penalty Amounts - Work.

a. The following stipulated penalties shall accrue per violation per day for any noncompliance identified in Subparagraph 74.b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 2,000	1st through 14th day
\$ 5,000	15th through 30th day
\$10,000	31st day and beyond

b. Compliance Milestones.

(1) Failure to complete any component of the Remedial Action in accordance with the schedule found in the Consent Decree, Statement of Work, or Remedial Action Work Plan;

(2) Failure to conduct studies or further work, or prepare work plans in accordance with Section VII (Remedy Review), Paragraphs 17, 19-21.

(3) Failure to use approved quality assurance, quality control, and chain of custody procedures for all sampling and analysis undertaken pursuant to this Consent Decree and to provide split samples in accordance with Paragraph 23;

(4) Failure to establish and maintain financial security in accordance with Section XIII (Assurance of Ability to Complete Work);

(5) Failure to retain records as required by Section XXV (Retention of Records);



(6) Failure to conduct/participate in community relations activities specified in the Community Relations Plan;

75. Stipulated Penalty Amounts - Reports.

a. The following stipulated penalties shall accrue per violation per day for failure to submit timely or adequate reports, other written documents, or items pursuant to Paragraphs 11, 12 (Remedial Action documents, draft and final), 14 (modifications to the SOW or work plans), 17 (Periodic Review), 21 (work plans for further response actions), 24 (sampling results), 33 (monthly and quarterly reports), and 39-44 (all plans, reports or other items):

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$ 1,000	1st through 14th day
\$ 4,000	15th through 30th day
\$ 6,000	31st day and beyond

Stipulated penalties at these amounts shall also be payable per violation per day to the State for failure to timely make payments due to the State pursuant to this Consent Decree under Section XVI (Payment for Response Costs).

76. a. In the event that EPA assumes performance of a portion or all of the Work pursuant to Paragraph 94 of Section XXI (Covenants Not to Sue by Plaintiffs), Settling Defendants shall be liable for a stipulated penalty in the amount of 20% of the costs to EPA of completing the work and 20% of TCEQ's costs associated with the State's statutory share of the work performed by EPA.

b. For each day Settling Defendants continue activity after the EPA Project Manager orders cessation or halt of activities pursuant to Section XII (Project Coordinators), Settling Defendants shall pay a stipulated penalty of \$32,500 per day. The EPA Project Coordinator's order may be verbal or written; all verbal orders shall be confirmed in writing by the EPA Project Coordinator within 48 hours after issuance.

77. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. However, stipulated penalties shall not accrue: (1) with respect to a deficient submission under Section XI (EPA Approval of Plans and Other Submissions), during the period, if any, beginning on the 31st day after EPA's receipt of such submission until the date that EPA notifies Settling Defendants of any deficiency; (2) with respect to a decision by the Director of the Superfund Division, EPA Region 6, under Paragraphs 70 or 71 or the State equivalent, under Paragraph 71 of Section XIX (Dispute Resolution), during the period, if any, beginning on the 21st day after the date that Settling Defendants' reply to EPA's or the State's Statement of Position is received until the date that the Director issues a final decision regarding such dispute; or (3) with respect to judicial review by this Court of any dispute under Section XIX (Dispute Resolution), during the period, if any, beginning on the 31st day after the Court's receipt of the final submission regarding the dispute until the date that the Court issues a final decision regarding such dispute. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

78. Following EPA's determination, after consultation with TCEQ, that Settling Defendants have failed to comply with a requirement of this Consent Decree, EPA may give Settling Defendants written notification of the same and describe the noncompliance. EPA and

the State may send the Settling Defendants a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Settling Defendants of a violation.

79. All penalties accruing under this Section shall be due and payable to the United States and/or the State within 30 days of the Settling Defendants' receipt from EPA of a demand for payment of the penalties from EPA, or the State if the dispute pertains to the State's Future Response Costs, unless Settling Defendants invoke the Dispute Resolution procedures under Section XIX (Dispute Resolution). The payment shall be made in accordance with the following procedures:

a. All payments to the United States under this Section shall be paid by certified or cashier's check made payable to "EPA Hazardous Substances Superfund," shall be mailed to U.S. Environmental Protection Agency, Superfund Accounting, P.O. Box 360582M, Pittsburgh, PA 15251, Attn: Collections Officer for Superfund Accounting, U.S. EPA Region 6, shall indicate that the payment is for stipulated penalties, and shall reference the EPA Region and Site/Spill ID #061J, the DOJ Case Number 90-11-3-655/2, and the name and address of the party making payment. Copies of checks paid pursuant to this Section, and any accompanying transmittal letters, shall be sent to the United States as provided in Section XXVI (Notices and Submissions), and to the Chief, Cost Recovery Section (6SF-AC), U.S. EPA Region 6, 1445 Ross Avenue, Suite 1200, Dallas, TX 75202-2733.

b. All payments to the State under this Section shall be in the form of a certified check made payable to the "State of Texas." The payment shall be mailed to the Chief, Natural Resources Division, Attorney General's Office, P.O. Box 12548, Austin, Texas 78711. The

check shall indicate that the payment is for stipulated penalties and shall bear the identifying number "AG#9137803."

80. The payment of penalties shall not alter in any way Settling Defendants' obligation to complete the performance of the Work required under this Consent Decree.

81. Penalties shall continue to accrue as provided in Paragraph 77 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued penalties determined to be owing shall be paid to EPA and the State within 15 days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States or the State prevails in whole or in part, Settling Defendants shall pay all accrued penalties determined by the Court to be owed to EPA and the State within 60 days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by Settling Defendants, Settling Defendants shall pay all accrued penalties determined by the District Court to be owing to the United States or the State into an interest bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA and the State or the Settling Defendants to the extent that they prevail. The obligation to pay accrued penalties into an interest bearing escrow account, as set forth in this Paragraph 81.c. may be stayed during the pendency of any appeal by the posting of a supersedeas bond under Federal Rule of Civil Procedure 62(d).

82. If Settling Defendants fail to pay stipulated penalties when due, the United States or the State may institute proceedings to collect the penalties, as well as Interest. Settling Defendants shall pay Interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 79.

83. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States or the State to seek any other remedies or sanctions available by virtue of Settling Defendants' violation of this Consent Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(l) of CERCLA, provided, however, that the United States shall not seek civil penalties pursuant to Section 122(l) of CERCLA for any violation for which a stipulated penalty is provided herein, except in the case of a willful violation of the Consent Decree.

84. Notwithstanding any other provision of this Section, the United States or the State may, in its unreviewable discretion, waive any portion of stipulated penalties that have accrued pursuant to this Consent Decree.

#### **XXI. COVENANTS NOT TO SUE BY PLAINTIFFS**

85. United States' Covenants. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 86, 87, and 93 of this Section, the United States covenants not to sue, or to take administrative action against Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA and Section 7003 of RCRA relating to the Site. Except with respect to future liability, these covenants not to sue shall take effect upon the receipt by EPA of the payments required by Paragraph 56.b of Section XVI (Payments for

Response Costs). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 52 of Section XIV (Certification of Completion). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

86. United States' Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants to perform further response actions relating to the Site, or to reimburse the United States for additional costs of response if, prior to Certification of Completion of the Remedial Action:

(i) conditions at the Site, previously unknown to EPA, are discovered, or

(ii) information, previously unknown to EPA, is received, in whole or in part,

and EPA determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.

87. United States' Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants to perform further response actions relating to the

Site, or to reimburse the United States for additional costs of response if, subsequent to

Certification of Completion of the Remedial Action:

(i) conditions at the Site, previously unknown to EPA, are discovered, or

(ii) information, previously unknown to EPA, is received, in whole or in part,

and EPA determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

88. For purposes of Paragraph 86, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date the ROD was signed and set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph 87, the information and the conditions known to EPA shall include only that information and those conditions known to EPA as of the date of Certification of Completion of the Remedial Action and set forth in the Record of Decision, the administrative record supporting the Record of Decision, the post-ROD administrative record, or in any information received by EPA pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

89. State's Covenants. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 90, 91, and 93 of this Section, the State covenants not to sue, or to take administrative actions, against Settling Defendants pursuant to Section 107 of CERCLA and applicable state laws, including, but not limited to, Texas Health

and Safety Code, Chapter 361, and Texas Water Code, Chapters 7 and 26, relating to the Site. Except with respect to future liability, these covenants not to sue shall take effect upon the receipt by the State of the payments required by Paragraph 56.a of Section XVI (Payments for Response Costs). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 52 of Section XIV (Certification of Completion). These covenants not to sue are conditioned upon the satisfactory performance by Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

90. State's Pre-certification Reservations. Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants to perform further response actions relating to the Site, or to reimburse the State for additional costs of response if, prior to Certification of Completion of the Remedial Action:

- (i) conditions at the Site, previously unknown to the TCEQ, are discovered or
- (ii) information, previously unknown to TCEQ, is received in whole or in part,

and TCEQ determines that these previously unknown conditions or information together with any other relevant information indicates that the Remedial Action is not protective of human health or the environment.



91. State's Post-certification Reservations. Notwithstanding any other provision of this Consent Decree, the State reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel Settling Defendants to perform further response actions relating to the Site, or to reimburse the State for additional costs of response if, subsequent to Certification of Completion of the Remedial Action:

- (i) if conditions at the Site, previously unknown to TCEQ, are discovered, or
- (ii) if information, previously unknown to TCEQ, is received, in whole or in part

and TCEQ determines that these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

92. For purposes of Paragraph 90, the information and the conditions known to TCEQ shall include only that information and those conditions known to TCEQ as of the date the ROD was signed and set forth in the Record of Decision for the Site and the administrative record supporting the Record of Decision. For purposes of Paragraph 91, the information and the conditions known to TCEQ shall include only that information and those conditions known to TCEQ as of the date of Certification of Completion of Remedial Action or set forth in the Record of Decision, the administrative record supporting the Record of Decision, the post-ROD administrative record, or in any information received by TCEQ pursuant to the requirements of this Consent Decree prior to Certification of Completion of the Remedial Action.

93. General reservations of rights. The United States and the State reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within Plaintiffs' covenants not to sue. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve all rights against Settling Defendants with respect to:

- a. claims based on a failure by Settling Defendants to meet a requirement of this Consent Decree;
- b. liability arising from the past, present, or future disposal, release, or threat of release of Waste Material outside of the Site;
- c. liability based upon the Settling Defendants' transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal of Waste Material at or in connection with the Site, other than as provided in the ROD, the Work, or otherwise ordered by EPA, after signature of this Consent Decree by the Settling Defendants;
- d. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;
- e. criminal liability; and
- f. liability for violations of federal or state law which occur during or after implementation of the Remedial Action.
- g. liability, if any prior to Certification of Completion of the Remedial Action, for additional response actions that EPA determines are necessary to achieve Performance Standards,

but that cannot be required pursuant to Paragraph 14 (Modification of the SOW or Related Work Plans).

h. liability for costs that may be incurred in the future by the Agency for Toxic Substance and Disease Registry related to the Site.

94. Work Takeover. In the event EPA determines that Settling Defendants have ceased implementation of any portion of the Work, are seriously or repeatedly deficient or late in their performance of the Work, or are implementing the Work in a manner which may cause an endangerment to human health or the environment, EPA may assume the performance of all or any portions of the Work as EPA determines necessary. Settling Defendants may invoke the procedures set forth in Section XIX (Dispute Resolution), Paragraph 70, to dispute EPA's determination that takeover of the Work is warranted under this Paragraph. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI (Payment for Response Costs). In the event EPA assumes the performance of all or any portions of the Work as EPA determines necessary, costs incurred by the State pursuant to CERCLA or in cooperation with EPA in performing the Work shall be considered Future Response Costs that Settling Defendants shall pay pursuant to Section XVI (Payments for Response Costs).

95. Notwithstanding any other provision of this Consent Decree, the United States and the State retain all authority and reserve all rights to take any and all response actions authorized by law.

## **XXII. COVENANTS BY SETTLING DEFENDANTS**

96. Covenant Not to Sue. Subject to the reservations in Paragraph 98, Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States or the State with respect to the Site, Past and Future Response Costs as defined herein, or this Consent Decree, including, but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 107, 111, 112, 113 or any other provision of law;

b. any claims against the United States, including any department, agency or instrumentality of the United States under CERCLA Sections 107 or 113 related to the Site, or

c. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law.

97. Except as provided in Paragraph 105 (waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event that the United States or the State brings a cause of action or issues an order pursuant to the reservations set forth in Paragraphs 86, 87, 90, 91, and 93.b-d and g-h, but only to the extent that Settling Defendants' claims arise from the same response action, response costs, or damages that the United States or the State is seeking pursuant to the applicable reservation.

98. The Settling Defendants reserve, and this Consent Decree is without prejudice to, claims against the United States, subject to the provisions of Chapter 171 of Title 28 of the United States Code, for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the United States while acting within the scope of his office or employment under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. However, any such claim shall not include a claim for any damages caused, in whole or in part, by the act or omission of any person, including any contractor, who is not a federal employee as that term is defined in 28 U.S.C. § 2671; nor shall any such claim include a claim based on EPA's selection of response actions, or the oversight or approval of the Settling Defendants' plans or activities. The foregoing applies only to claims which are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA.

99. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

100. Settling Defendants agree not to assert any claims and to waive all claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any person where the person's liability to the Settling Defendants with respect to the Site is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at the Site, or having accepted for transport for disposal or treatment of hazardous substances at the Site, if:

a. the materials contributed by such person to the Site containing hazardous substances did not exceed the greater of (i) 0.002% of the total volume of waste at the Site, or (ii) 110 gallons of liquid materials or 200 pounds of solid materials.

b. This waiver shall not apply to any claim or cause of action against any person meeting the above criteria if EPA has determined that the materials contributed to the Site by such person contributed or could contribute significantly to the costs of response at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Defendant.

### **XXIII. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION**

101. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Consent Decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each Party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

102. The Parties agree, and by entering this Consent Decree this Court finds, that the Settling Defendants are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2) for matters addressed in this Consent Decree. The “matters addressed” in this settlement are all response actions taken or to be taken and all response costs incurred or to be incurred by the United States,

the State, or any other person with respect to the Site. The “matters addressed” in this settlement do not include those response costs or response actions as to which the United States and the State have reserved their rights under this Consent Decree (except for claims for failure to comply with this Decree), in the event that the United States or the State asserts rights against the Settling Defendants that come within the scope of such reservations.

103. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States and the State in writing no later than 60 days prior to the initiation of such suit or claim.

104. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States and the State within 10 days of service of the complaint on them. In addition, Settling Defendants shall notify the United States and the State within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

105. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXI (Covenants Not to Sue by Plaintiffs).

#### **XXIV. ACCESS TO INFORMATION**

106. Except as provided in Paragraph 107.b, Settling Defendants shall provide to EPA and the State, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. Settling Defendants shall also make available to EPA and the State, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

##### **107. Business Confidential and Privileged Documents.**

a. Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiffs under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA and the State, or if EPA has notified Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2, Subpart B, the public may be given access to such documents or information without further notice to Settling Defendants.



b. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information: and (6) the privilege asserted by Settling Defendant. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

108. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

## **XXV. RETENTION OF RECORDS**

109. Until 10 years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 53 of Section XIV (Certification of Completion), Settling Defendants shall preserve and retain all non-identical copies of records and documents (including records or documents in electronic form) now in its possession or control or which come into its possession or control that relate in any manner to its liability under CERCLA with respect to the Site, together with all documents and records that relate to the liability of any other person under CERCLA with respect to the Site. Settling Defendants must also retain, and instruct their contractors and agents to

preserve, for the same period of time specified above all non-identical copies of the last draft or final version of any documents or records (including documents or records in electronic form) now in their possession or control or which come into their possession or control that relate in any manner to the performance of the Work, provided, however, that Settling Defendants (and their contractors and agents) must retain, in addition, copies of all data generated during the performance of the Work and not contained in the aforementioned documents required to be retained. Each of the above record retention requirements shall apply regardless of any corporate retention policy to the contrary. Notwithstanding the above, Settling Defendants may elect to transfer all such records to EPA at any point during the 10 year period upon approval by EPA.

110. At the conclusion of this document retention period, Settling Defendants shall notify the United States and the State at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States or the State, Settling Defendants shall deliver any such records or documents to EPA or the State. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege, they shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

111. Settling Defendants hereby certify individually that, to the best of their knowledge and belief, after thorough inquiry, they have not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information (other than identical copies) relating to their potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against them regarding the Site and that they have fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

#### **XXVI. NOTICES AND SUBMISSIONS**

112. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, the State, and the Settling Defendants, respectively.

**As to the United States:**

Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611  
Re: DJ # 90-11-3-655/2

and

Director, Superfund Division (6SF)  
United States Environmental Protection Agency  
Region 6  
1445 Ross Ave., Suite 1200  
Dallas, TX 75202

As to EPA:

Gary Baumgarten  
EPA Remedial Project Manager (6SF-AP)  
United States Environmental Protection Agency  
Region 6  
1445 Ross Ave., Suite 1200  
Dallas, TX 75202

As to the Regional Cost Recovery Officer:

Chief, Cost Recovery Section (6SF-AC)  
U.S. Environmental Protection Agency  
Region 6  
1445 Ross Ave., Suite 1200  
Dallas, TX 75202

As to the State:

Albert M. Bronson, Esq.  
Assistant Attorney General  
Office of the Attorney General  
State of Texas  
P.O. Box 12548  
Austin, TX 78711-2548

As to the TCEQ:

Alcoa Project Coordinator  
Remediation Division  
Texas Commission on Environmental Quality  
Technical Park Center  
12100 Park 35 Circle, Bldg. D  
Austin, TX 78753

As to the Settling Defendants:

Legal Department  
Alcoa Inc.  
201 Isabella Street  
Pittsburgh, PA 15212-5858

Settling Defendants' Project Coordinator  
Ronald W. Weddell  
Remediation Business Unit Manager  
Alcoa Inc.  
P.O. Box 101  
Point Comfort, Texas 77978

**XXVII. EFFECTIVE DATE**

113. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court, except as otherwise provided herein.

**XXVIII. RETENTION OF JURISDICTION**

114. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendants for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XIX (Dispute Resolution) hereof.

**XXIX. APPENDICES**

115. The following appendices are attached to and incorporated into this Consent Decree:

“Appendix A” is the ROD.

“Appendix B” is the SOW.

“Appendix C” is the description and/or map of the Site.

### **XXX. COMMUNITY RELATIONS**

116. Settling Defendants shall propose to EPA their participation in the community relations plan to be developed by EPA. EPA will determine the appropriate role for the Settling Defendants under the Plan. Settling Defendants shall also cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

### **XXXI. MODIFICATION**

117. Schedules specified in this Consent Decree for completion of the Work may be modified by agreement of EPA, after consultation with the TCEQ, and the Settling Defendants. All such modifications shall be made in writing.

118. Except as provided in Paragraph 14 (Modification of the SOW or Related Work Plans), no material modifications shall be made to the SOW without written notification to and written approval of the United States, Settling Defendants, and the Court, if such modifications fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(B)(ii). Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review and comment on the proposed modification. Modifications to the SOW that do not materially alter that document, or material modifications to the SOW that do not fundamentally alter the basic features of the selected remedy within the meaning of 40 C.F.R. § 300.435(c)(2)(B)(ii), may be made by written

agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendants.

119. Nothing in this Consent Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

#### **XXXII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT**

120. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. This Consent Decree is also subject to the public participation requirements of notice, an opportunity for a public meeting in the affected area, and a reasonable opportunity for public comment prior to final entry in accordance with Section 7003(d) of RCRA, 42 U.S.C. § 6973(d). The United States and the State shall file with the District Court any written comments received and the United States' and the State's response thereto. The United States and/or the State reserve the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

121. State public comment. The Parties agree and acknowledge that final approval by the State and entry of this Consent Decree is subject to publication of Notice of Settlement in the Texas Register, an opportunity for public comment, and consideration of any comments.

122. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

### **XXXIII. SIGNATORIES/SERVICE**

123. The undersigned representatives of the Settling Defendants, the Assistant Attorney General for the Environment and Natural Resources Division of the Department of Justice, and the Attorney General of the State of Texas certify that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such Party to this document.

124. Settling Defendants hereby agree not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

125. Settling Defendants shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on their behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons. The Parties agree that Settling Defendants need not file an answer to the Complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

### **XXXIV. TERMINATION OF ADMINISTRATIVE ORDER ON CONSENT**

126. In accordance with Section XXVIII of the AOC, "Termination and Satisfaction," Settling Defendant Alcoa Inc. has submitted to EPA written evidence that all activities required under the AOC (In the Matter of Alcoa (Point Comfort)/Lavaca Bay Superfund Site, U.S. EPA CERCLA Docket No. 6-11-94)) have been completed, with an attestation by a responsible



corporate official. EPA is satisfied that all activities required under the AOC have been performed, and approve Settling Defendant Alcoa, Inc.'s certification pursuant to Section XXVIII of the AOC. The AOC will terminate upon the Effective Date of this Consent Decree.

**XXXV. FINAL JUDGMENT**

126. This Consent Decree and its appendices constitute the final, complete, and exclusive agreement and understanding among the parties with respect to the settlement embodied in the Consent Decree. The parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

127. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute a final judgment between and among the United States and the Settling Defendants. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS \_\_\_\_ DAY OF \_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States and State of Texas v. Alcoa, Inc. et al., relating to the Alcoa/Lavaca Bay Superfund Site.

**FOR THE UNITED STATES OF AMERICA**

11.30.04  
Date

\_\_\_\_\_  
THOMAS L. SANSONETTI  
Assistant Attorney General  
Environment and Natural Resources Division  
U.S. Department of Justice  
Washington, D.C. 20530

Oct. 28, 2004  
Date

\_\_\_\_\_  
ELIZABETH A. EDMONDS, Trial Attorney  
Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044-7611

MICHAEL T. SHELBY  
U.S. Attorney  
Southern District of Texas

LARRY LUDKA  
Assistant United States Attorney  
Texas Bar No. 12667500  
U.S. Attorney's Office  
Southern District of Texas, Corpus Christi  
Division  
800 North Shoreline Blvd. #500  
Corpus Christi, TX 78476-2001

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States and State of Texas v. Alcoa, Inc. et al., relating to the Alcoa/Lavaca Bay Superfund Site.

**FOR U.S. ENVIRONMENTAL PROTECTION AGENCY:**

OCT 19 2004

Date

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RICHARD E. GREENE  
Regional Administrator  
U.S. Environmental Protection Agency  
Region 6  
1445 Ross Ave., Suite 1200  
Dallas, TX 75202

Oct 22, 2004

Date

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PAMELA J. TRAVIS  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region 6  
1445 Ross Ave., Suite 1200  
Dallas, TX 75202

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States and State of Texas v. Alcoa, Inc. et al., relating to the Alcoa/Lavaca Bay Superfund Site.

**FOR THE STATE OF TEXAS:**

GREG ABBOTT  
Attorney General of Texas

BARRY R. McBEE  
First Assistant Attorney General

EDWARD D. BURBACH  
Deputy Attorney General for Litigation

KAREN W. KORNELL  
Assistant Attorney General  
Chief, Natural Resources Division

9/26/04  
Date

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ALBERT M. BRONSON  
Assistant Attorney General  
State Bar No. 03057500

Natural Resources Division  
P.O. Box 12548, Capitol Station  
Austin, TX 78711-2548

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States and State of Texas v. Alcoa, Inc. et al., relating to the Alcoa/Lavaca Bay Superfund Site.

FOR ALCOA INC.:

10/22/04  
Date

Signature: [Signature] RW  
Name (print): Bernt Reitan  
Title: Vice President  
Address: 201 Isabella Street  
Pittsburgh, PA 15212  
\_\_\_\_\_  
\_\_\_\_\_

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): Ralph W. Waechter  
Title: Remediation Manager  
Address: 201 Isabella Street  
Pittsburgh, PA 15212  
\_\_\_\_\_  
Tel: \_\_\_\_\_  
Fax: \_\_\_\_\_

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States and State of Texas v. Alcoa, Inc. et al., relating to the Alcoa/Lavaca Bay Superfund Site.

**FOR ALCOA WORLD ALUMINA L.L.C.:**

10/22/04  
Date

Signature: [Signature]

Name (print): John M. Sibly

Title: President

Address: 201 Isabella Street  
Pittsburgh, PA 15212

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name (print): Ralph W. Waechter

Title: Remediation Manager

Address: 201 Isabella Street  
Pittsburgh, PA 15212

Tel: \_\_\_\_\_

Fax: \_\_\_\_\_